FILED
NOV 5 1992
OFFICE OF THE CLERK

(2)

No. 92-627

In The
Supreme Court of the United States
October Term, 1992

CITY VENDING OF MUSKOGEE, INC.,
Petitioner,

v.

OKLAHOMA TAX COMMISSION,
Respondent.

On Petition For Writ Of Certiorari To The Supreme Court of Oklahoma

RESPONDENT'S BRIEF IN OPPOSITION

STANLEY JOHNSTON
Deputy General Counsel
(Counsel of Record)

DAVID HUDSON
General Counsel

OKLAHOMA TAX COMMISSION
P.O. Box 53248
Oklahoma City, OK 73152-3248
(405) 521-3141
Attorneys for Respondent

BEST AVAILABLE COPY

QUESTION PRESENTED

Petitioner's state cigarette wholesaler's license was revoked by respondent Tax Commission, after a hearing, because of petitioner's sales of unstamped (untaxed) cigarettes to Indians and Indian tribes for resale. Petitioner had claimed its sales to Indian tribes were exempt from state taxation under the Indian Commerce Clause, but petitioner did not appeal the Tax Commission's decision. Thereafter, the Tax Commission sought and obtained an injunction in state court prohibiting petitioner from continued sales of cigarettes without a valid state license. On appeal, the Oklahoma Supreme Court held the unappealed revocation order was final and valid, and upheld the injunction.

The question presented is: Does the Indian Commerce Clause bar all state taxation of cigarettes sold to Indian tribes for resale, or provide a basis for collateral attack on the final and otherwise valid license revocation order?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 6

I. The Questions attempted to be raised on this petition have already been decided against the petitioner by the Tenth Circuit in *City Vending I* and by applicable decisions of this Court 6

II. The decision below rests upon independent and adequate nonfederal grounds 8

CONCLUSION 10

APPENDIX (State statutes involved) A-1

TABLE OF AUTHORITIES

Page

CASES

City Vending of Muskogee, Inc. v. Oklahoma Tax Commission, 898 F.2d 122 (10th Cir. 1990) .. 1,6,7,9

Conoco, Inc. v. State Dept. of Health, 651 P.2d 125 (Okla. 1982) 9

Fox Film Corporation v. Muller, 296 U.S. 207 (1935) . 9

Gibson Co., Inc. v. Oklahoma Tax Commission, 180 Okla. 53, 68 P.2d 87 (1937) 8

McCoy v. Shaw, 277 U.S. 302 (1928) 9

Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 111 S.Ct. 905 (1991) .. 5,7

Scoufus v. Fuller, 280 P.2d 720 (Okla. 1955) 9

Washington v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980) 7

TABLE OF AUTHORITIES—continued

Page

STATUTES

OKLA. STAT. tit. 68, §212 (1981) 8

OKLA. STAT. tit. 68, §225 (1981) 8

OKLA. STAT. tit. 68, §304 (1981) 8

In The

Supreme Court of the United States

October Term, 1992

CITY VENDING OF MUSKOGEE, INC.,

Petitioner,

v.

OKLAHOMA TAX COMMISSION,

Respondent.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

Respondent Oklahoma Tax Commission respectfully requests that the Court deny the petition for writ of certiorari, for the reason that the decision below does not conflict with applicable decisions of this Court, and no substantial or unsettled federal questions are presented.

OPINIONS BELOW

The opinion of the Oklahoma Supreme Court in this case is reported at 835 P.2d 97.

In a prior, related case between these same parties, *City Vending of Muskogee, Inc. v. Oklahoma Tax Commission*, 898 F.2d 122 (10th Cir. 1990), *cert. denied*,

111 S.Ct. 75 (1990) ("*City Vending I*"), arising out of petitioner's subsequent bankruptcy case, petitioner sought relief from the tax assessment portion of the same Commission order involved in this case. There, as here, petitioner contended that the Commission's order was void. That issue was decided against the petitioner.

JURISDICTION

The opinion below rests upon independent and adequate nonfederal grounds. The Oklahoma Supreme Court found that the order revoking petitioner's wholesale cigarette license for nonexempt sales of unstamped and untaxed cigarettes for resale within the state, entered by respondent Tax Commission after notice and hearing, was made by the state agency authorized by state law to hear and determine such matters; was valid on the face of the record; and, being unappealed, became final and binding under state law and not subject to collateral attack in the subsequent injunction action.

In the related case, dealing with the taxes assessed by the same Tax Commission order, the United States Court of Appeals for the Tenth Circuit reached the same conclusion. This Court denied review.

STATUTES INVOLVED

The relevant Oklahoma tax procedure statutes involved, OKLA. STAT. tit. 68, §212 (license revocations)

and §225 (appeals), are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

Petitioner, City Vending of Muskogee, Inc., was an Oklahoma-based cigarette wholesaler, and licensed by respondent Tax Commission for that purpose. Oklahoma imposes a tax on the sale of cigarettes for use or consumption within the state, the payment of which is evidenced by tax stamps affixed to each package of cigarettes sold. The tax is imposed on the ultimate consumer, but is collected initially from the wholesaler who is required to purchase the stamps from the Commission and affix them to the cigarettes prior to their first sale.

In May, 1985, after an audit, the Commission issued a proposed tax assessment against City Vending, and a notice of the Commission's intent to revoke City Vending's cigarette wholesaler's license, because of City Vending's in-state sale and distribution of large quantities of unstamped cigarettes. City Vending protested both the tax assessment and the proposed license revocation.

By agreement, the tax assessment and license revocation were combined into one proceeding, and a hearing was held before the Commission's administrative law judge. City Vending's defense was that all of the unstamped cigarettes in question had been sold to Indian tribes for resale by them, and that the Commerce Clause of the United States Constitution prohibited the State

from taxing those sales. This, according to City Vending, was true regardless of to whom the tribe later resold the cigarettes, or where. Thus, City Vending presented no evidence in the license revocation proceeding, nor is there any in the record below, as to the identity of the ultimate consumers of the cigarettes it had sold, or whether any such persons were exempt from tax.

After the hearing, the administrative law judge issued findings of fact and conclusions of law, and a recommendation that the tax protest be denied and City Vending's wholesale license be revoked. The Oklahoma Tax Commission adopted the findings, etc. of the administrative law judge as the Order of the Commission. Although entitled to appeal the Commission's order directly to the Oklahoma Supreme Court, City Vending failed to do so, and the order became final under state law.

City Vending continued selling cigarettes after its license had been revoked, and the Tax Commission instituted the instant proceedings in state court to enjoin City Vending from the further sale of cigarettes without a valid license. The injunction was granted and City Vending appealed.

In its appeal, City Vending argued that the Tax Commission's order revoking its license was void for lack of subject matter jurisdiction because the Commission had failed to rule on City Vending's Commerce Clause defense, and for the further reason that the Commerce Clause prohibited states from requiring cigarette

wholesalers to collect state tax on cigarettes sold to Indian tribes for resale. The Oklahoma Supreme Court rejected both contentions. First, the court observed that state law grants the Oklahoma Tax Commission the authority to issue, refuse to issue, suspend or cancel cigarette wholesaler's licenses, to conduct hearings relative thereto, and to enter binding orders thereon. The court further noted that all defenses raised before the Tax Commission—including defenses based on the United States Constitution or federal law—could be fully adjudicated by the court on direct appeal. In the absence of a direct appeal, the court found that the underlying revocation order could be collaterally attacked only if it appeared *from the face of the record* that the Commission's order was void for lack of jurisdiction. Since the Oklahoma Tax Commission has specific authority under state law to revoke City Vending's license, the court found no lack of subject matter jurisdiction.

Next, although it was unnecessary to a decision in the case, the court considered City Vending's argument that the Commerce Clause exempts all sales by a wholesaler to an Indian tribe. Following this Court's pronouncement in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 111 S.Ct. 905 (1991), the court likewise rejected this argument. The court went on to observe that City Vending had not affirmatively demonstrated on the record that any of the tribes or Indians it sold to did not resell at the retail level, or that any resales were made to tribal members; and that the record, therefore, did not support any claim of exemption from state tax. The court did not, as petitioner suggests,

rule that the state could tax cigarettes ultimately sold to members of the reselling tribe. The court specifically recognized that such sales, *if shown*, would not be taxable. 835 P.2d at 101, Pet. App. at A-6. However, there was nothing in the record to establish such sales. *Id.*

Having thus concluded that the Commission's revocation order was final and not facially void, and there being no other claim of error or abuse of discretion on the part of the trial court, the injunction was upheld.

REASONS FOR DENYING THE WRIT

I.

The Questions attempted to be raised on this petition have already been decided against the petitioner by the Tenth Circuit in *City Vending I* and by applicable decisions of this Court.

Approximately a year after the Commission's order revoking City Vending's license and denying City Vending's protest to the tax assessment, City Vending filed a voluntary petition in bankruptcy in the Eastern District of Oklahoma. In the bankruptcy case, City Vending then filed an adversary proceeding against the Tax Commission, seeking a declaration that this tax assessment and a subsequent one made upon ensuing sales were void, and also seeking to recover the taxes paid on the first assessment. Unsuccessful, City Vending pursued an appeal to the United States Court of Appeals for the Tenth Circuit. *City Vending of Muskogee, Inc. v. Oklahoma*

Tax Commission, 898 F.2d 122 (10th Cir. 1990). There, as here, City Vending asserted that the Tax Commission lacked jurisdiction to tax City Vending's sales to Indian tribes, and that the Commission's order denying the protest and affirming the assessment was void. The Court of Appeals rejected this claim. It found that the Commission's order was not void and, the contested assessment having become final under state law prior to the bankruptcy petition's filing, could not be relitigated. *Id.* at 125. This Court denied review. 111 S.Ct. 75 (1990).

In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 111 S.Ct. 905 (1991), this Court, *citing City Vending I*, specifically affirmed the authority of the states to require cigarette wholesalers to collect these taxes, and to assess the wholesaler for its failure to do so: "[U]nder today's decision, States may of course collect the sales tax from cigarette wholesalers, . . . by assessing wholesalers who supplied unstamped cigarettes to the tribal stores." *Id.*, at 912. Prior to *Citizen Band Potawatomi*, this Court had already disposed of petitioner's claim that the Indian Commerce Clause acts as a bar to all state taxation of cigarettes sold to Indian tribes for resale. *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 157 (1980) ("It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes.").

Clearly, the Tax Commission had the authority to require City Vending to collect the taxes in question.

Upon City Vending's failure to do so, the Commission had the authority and jurisdiction under state law to cancel petitioner's wholesale license. OKLA. STAT. tit. 68, §212 (1981); *Gibson Co., Inc. v. Oklahoma Tax Commission*, 180 Okla. 53, 68 P.2d 87 (1937).

II.

The decision below rests upon independent and adequate nonfederal grounds.

Although the court below considered petitioner's Commerce Clause claim and, consistently with the applicable decisions of this Court and of the Tenth Circuit Court of Appeals, rejected that claim, that consideration was unnecessary to a full and complete decision in this case. The decision below rested first and foremost upon whether or not the Commission's final order revoking City Vending's license was subject to collateral attack in the subsequent injunction action. This is a question of general, nonfederal law.

Cigarette wholesalers in Oklahoma are required to be licensed by the Oklahoma Tax Commission. OKLA. STAT. tit. 68, §304 (1981). The Tax Commission is authorized, after notice and hearing, to cancel such licenses for violations of the provisions of any state tax law. OKLA. STAT. tit. 68, §212 (1981). The Commission's order cancelling a license is appealable directly to the Oklahoma Supreme Court. OKLA. STAT. tit. 68, §225 (1981). City Vending received the required notice and hearing, had judgment rendered against it, and did not appeal. Under

Oklahoma law, that revocation order became final. *Conoco, Inc. v. State Dept. of Health*, 651 P.2d 125 (Okla. 1982).

In Oklahoma, as in other states and in the federal courts, a final judgment is not subject to collateral attack unless the judgment is void on its face. *Scoufus v. Fuller*, 280 P.2d 720 (Okla. 1955). The court here examined the record before it and concluded the Commission's order was not facially void. Although that conclusion was abundantly correct, *City Vending v. Oklahoma Tax Commission*, 898 F.2d at 125, whether it was right or wrong this Court need not determine. *Fox Film Corporation v. Muller*, 296 U.S. 207 (1935).

It is settled law that a judgment of a state court which is put upon a nonfederal ground, independent of the federal question involved and broad enough to sustain the judgment, will not be reviewed by this Court, unless the nonfederal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of a decision upon the federal question. *McCoy v. Shaw*, 277 U.S. 302, 303 (1928). *Shaw* dealt with a decision by the Oklahoma Supreme Court as to the adequacy of a remedy under state law. Here, the court dealt with the state-law validity of a final agency decision. As in *Shaw*, the nonfederal ground upon which the Oklahoma court here based its decision is predicated upon the court's earlier decisions, and is broad enough and substantial enough to sustain the judgment without reference to any federal question.

CONCLUSION

The decision below is in harmony with the decisions of this Court, and rests upon independent and adequate nonfederal grounds broad enough to sustain the judgment. The petition for certiorari should be denied.

Respectfully submitted,

STANLEY JOHNSTON
Deputy General Counsel
(Counsel of Record)

DAVID HUDSON
General Counsel
OKLAHOMA TAX COMMISSION
P.O. Box 53248
Oklahoma City, OK 73152-3248
(405) 521-3141
Attorneys for Respondent

APPENDIX

Oklahoma Uniform Tax Procedure Code, Okla. Stat. tit. 68 (1981):

§212. Cancellation or refusal of license or permit

(a) The Tax Commission is authorized to cancel or to refuse the issuance, extension or reinstatement of any license, permit or duplicate copy thereof, under the provisions of any state tax law or other law, to any person, firm, or corporation who shall be guilty of:

(1) Violation of any of the provisions of this article;

(2) Violation of the provisions of any state tax law;

(3) Violation of the rules and regulations promulgated by the Tax Commission for the administration and enforcement of any state tax law, or

(4) Failure to observe or fulfill the conditions upon which the license or permit was issued, or

(5) Nonpayment of any delinquent tax or penalty.

(b) Before any license, permit or duplicate copy thereof may be canceled, or the issuance, reinstatement, or extension thereof refused, the Tax Commission shall give the owner of such license or permit, or applicant therefor, twenty (20) days' notice by registered mail or certified mail with return receipt requested, of a hearing before said Tax Commission, granting said person an opportunity to show cause why such action should not be taken.

(c) Upon the cancellation of any license, permit, or duplicate copy thereof by the Tax Commission, all accrued taxes and penalties, although said taxes and penalties are not, at the time of the cancellation, due and payable under the terms of the state tax law imposing or levying such tax or taxes, shall become due and payable concurrently with the cancellation of such license, permit or duplicate copy thereof, and the licensee or permittee shall forthwith make a report covering the period of time not covered by preceding reports filed by said person and ending with the date of the cancellation and shall pay all such taxes and penalties.

(d) The Tax Commission may enter its order temporarily suspending any license, permit or duplicate copy thereof pending a final hearing before it on the subject of the cancellation of such license, permit or duplicate copy thereof, and may give notice of such temporary suspension at the same time that notice of its intention to cancel any license, permit or duplicate copy or to refuse the issuance, reinstatement or extension thereof is given, as provided by this section. After being given notice of any such order of suspension, it shall be unlawful for any person to continue to operate his business under any such suspended license, permit or duplicate copy thereof, and in the event any such person shall continue or threaten to continue such unlawful operations after having received proper notice of the suspension of his license, permit or duplicate copy thereof, upon complaint of the Tax Commission such person shall be enjoined from further operating or conducting such unlawful business pending final hearing by the Tax Commission. In all cases where injunction

proceedings are brought under this article, the Commission shall not be required to furnish bond, and where notice of suspension of any license, permit or duplicate copy thereof has been given in accordance with the provisions of this section, no further notice shall be required before the issuance of a temporary restraining order.

§ 225. Appeals

(a) Any taxpayer aggrieved by any order, ruling, or finding of the Tax Commission directly affecting such taxpayer may appeal therefrom directly to the Supreme Court of Oklahoma. A taxpayer so desiring to appeal shall, within ten (10) days from the date of mailing to the taxpayer of any such order, ruling, or finding, file with the Tax Commission a written notice of his intention to appeal.

(b) Within thirty (30) days from the date of mailing to the taxpayer of the order, ruling, or finding complained of, the taxpayer desiring to appeal shall file in the office of the Clerk of the Supreme Court a petition in error specifying the grounds upon which such appeal is based. At the same time the taxpayer shall request that the Tax Commission prepare for filing with the Supreme Court, within thirty (30) days, the record of the appeal, certified to by the Secretary of the Tax Commission, and consisting of any citations, findings, judgments, motions, orders, pleadings and rulings, together with a transcript of all evidence introduced at any hearing relative thereto, or such portion of such citations, findings, judgments,

motions, orders, pleadings, rulings, and evidence as the appealing parties and the Tax Commission may agree to be sufficient to present fully to the Court the questions involved. Upon request of the taxpayer, the Tax Commission shall furnish him a copy of the proceedings had in connection with the matter complained of.

(c) As a condition precedent to the right of the taxpayer to prosecute such an appeal, and as a jurisdictional prerequisite of the Supreme Court to entertain such appeal, it is specifically provided that, if the appeal be from an order, judgment, finding, or ruling of the Tax Commission assessing a tax or an additional tax, penalties, and interest, the taxpayer shall pay to the Tax Commission the amounts assessed. If, upon a final determination of the appeal the order assessing such tax, penalties, and interest is reversed or modified and it is determined that said tax or part thereof was erroneously or illegally assessed, said amounts so paid by the taxpayer, together with the interest thereon at the rate of three percent (3%) per annum, shall be refunded to the taxpayer by the Tax Commission.

(d) Such refunds and interest thereon shall be paid by the Tax Commission out of monies in the Tax Commission clearing account from subsequent collections from the same source as the original tax assessment, provided that in the event there are insufficient funds for refunds from subsequent collections from the same source, the refund shall be paid by the Tax Commission from monies appropriated by the Legislature to the special refund reserve account for such purposes as hereinafter

provided. There is hereby created within the official depository of the State Treasury an agency special account for the Tax Commission for the purpose of making such refunds as may be required under this section, not otherwise provided. This account shall consist of monies appropriated by the Legislature for the purpose of making refunds under this section.

(e) In lieu of the cash payment provided for in the preceding paragraph, the taxpayer may file with the Tax Commission a bond in double the amount of the tax, additional tax, penalties and interest so assessed, conditioned that he will faithfully and diligently prosecute such appeal to a final determination, and in the event the order, judgment, ruling or finding of the Tax Commission be affirmed on appeal, will pay such tax, additional tax, penalties and interest, and costs so assessed against him.

(f) If the appeal be from an order, judgment, finding or ruling of the Tax Commission other than one assessing a tax and from which a right of appeal is not otherwise specifically provided for in this article, any aggrieved taxpayer may appeal from any such order, judgment, finding or ruling as provided in this section and may supersede the effect of such order, judgment, ruling or finding by filing with the Tax Commission a bond in an amount fixed by the Tax Commission payable to the State of Oklahoma conditioned that such appeal will faithfully and diligently be prosecuted to a final determination, and in the event the order, judgment, ruling or finding of the Tax Commission be affirmed on appeal, that such person will immediately conform thereto.

(g) This section shall be construed to provide to the taxpayer a legal remedy by action at law in any case where a tax, or the method of collection or enforcement thereof, or any order, ruling, finding or judgment of the Tax Commission is complained of, or is sought to be enjoined in any action in any court of this state or the United States of America.